IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 2[illegible]

ELI LILLY AND COMPANY,

Appellant,

vs.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

JOSEPH H. STAMLER,
MELVIN P. ANTELL,
11 Commerce Street,
Newark 2, New Jersey,

LORENTZ & STAMLER,
Of Counsel.

EVERETT I. WILLIS,
40 Wall Street,
New York 5, New York,
Attorneys for Eli Lilly and Company, Appellant.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4994

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CASES CITED

NOTE: The following additional cases are cited in a footnote on pages 8 and 9 to show the unanimity of states other than New Jersey on the question here involved:

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Advance-Rumely Thresher Co. v. *Stohl*, 75 Utah 124, 283 Pac. 731 (1929)

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United States Constitution Cited.

Federal Statutes Cited.

New Jersey Statutes Cited.

Statutes from Other States Cited.

Other Authorities Cited.

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ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

Appellant appeals from a judgment of the Supreme Court of New Jersey entered on March 7, 1960 and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented under the Constitution of the United States.

Opinions Below.

The opinion of the Supreme Court of New Jersey is reported in 31 N. J. 591, 158 A. 2d 528. The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 57 N. J. Super. 291, 154 A. 2d 650. Copies of the opinions and judgments of both courts are appended hereto as Appendix A, B, C and D.

Jurisdiction.

This suit was brought by appellant in the Superior Court of New Jersey, Chancery Division, for an injunction against appellee under the New Jersey Fair Trade Act. N. J. Rev. Stat. 56:4-3, et seq. The judgment of that court dismissing the complaint was affirmed by the Supreme Court of New Jersey, and judgment entered, on March 7, 1960. Notice of Appeal was filed in the Supreme Court of New Jersey on May 2, 1960.

Jurisdiction of the appeal is conferred by 28 U. S. C. § 1257(2) since there is drawn in question the validity of a New Jersey statute under the Commerce Clause of the United States Constitution and the decision below was in favor of its validity. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282 (1921); *Eureka Pipe Line Co.* v. *Hallanan,* 257 U. S. 265 (1921); *Fiske* v. *Kansas,* 274 U. S. 380 (1927); *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94 (1940); *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942).

Statutes Involved.

Sections 14:15-3, 4, 5, and 6 of the New Jersey Revised Statutes are set forth in Appendix E hereto.

Question Presented.

Is a state statute repugnant to the Commerce Clause (Article I, Section 8) of the Constitution of the United States when applied to deny to a foreign corporation the right to engage in interstate commerce in the state, and to deny it access to the courts of the state, unless and until it obtains from the state a certificate of authority and subjects itself to all the requirements and obligations incident to domestication?

Statement.

Appellant is an Indiana corporation, engaged in the business of manufacturing and selling pharmaceutical products. Its products are manufactured in Indiana and distributed throughout the United States and in foreign countries. As found by the trial court, appellant does not sell its products to the local retail trade, but only in interstate commerce to wholesale distributors which, in turn, sell to retail dealers (Opinion, Appendix C, p. 23).

All of appellant's products sold to New Jersey wholesalers are shipped directly from Indiana, pursuant to contracts made in Indiana, and appellant maintains no warehouse or stock of goods in New Jersey. Appellant's activities in New Jersey are limited to the work of eighteen

detail men, a supervisor and his secretary. These detail men do not solicit or take orders but merely visit New Jersey pharmacists, physicians and hospital personnel to acquaint them with appellant's products. Their supervisor leases an office in Newark for which he is reimbursed by appellant. Appellant's name appears on the door of this office and in the telephone directory, but appellant owns no property in the state and does not enter into contracts in New Jersey. In fact, appellant maintains no contacts with New Jersey beyond those incidental to its business in interstate commerce.

As part of its national program of promoting its trademarks and name and maintaining the good will incident thereto, appellant entered into contracts in the state of Indiana with a number of New Jersey drug retailers pursuant to which the retailers agreed not to resell appellant's products at less than the prices established by appellant. Thereupon, under the New Jersey Fair Trade Act, N. J. Rev. Stat. 56:4-3, et seq., and the Maguire Act, 15 U. S. C. § 1, the prices so established became obligatory upon nonsigning retailers having notice of such contracts as well as those who had signed the contracts. Where necessary, appellant over the years has sought injunctive relief against retailers who have wilfully violated appellant's lawfully established prices. In New Jersey alone the state courts have issued more than 30 injunctions in suits brought by appellant against such retailers.

This suit was begun on July 3, 1959, against appellee, Sav-On-Drugs, Inc., a drug retailer, to enjoin sales by appellee of appellant's trademarked products at less than appellant's established minimum resale prices. Appellee moved for a summary judgment dismissing the complaint

on the ground that appellant was a foreign corporation transacting business in New Jersey without first having received a certificate of authority to do so from the secretary of state in accordance with N. J. Rev. Stat. 14:15-3.

In opposition to the motion for summary judgment appellant contended in its brief and oral argument, that these provisions do not apply to appellant because its business in New Jersey is entirely in interstate commerce and that to apply the statute to appellant "is forbidden by the commerce clause of the Federal Constitution" (Opinion, Appendix C, p. 28).

While conceding that appellant's business was entirely in interstate commerce (Opinion, Appendix C, p. 23), the trial court nevertheless ruled that appellant was required to obtain a certificate of authority from the secretary of state as a condition to maintaining the present action. On the constitutional question the court held that the application of the New Jersey statute to bar appellant's suit was not unconstitutional under the Commerce Clause of the United States Constitution despite the interstate character of appellant's business.

On appeal to the Supreme Court of New Jersey, appellant raised the same constitutional objection in its brief and oral argument.* The Supreme Court affirmed the judgment below, one justice dissenting, resting its decision on the opinion of the trial court. Judgment was entered on March 7, 1960, and it is from this judgment that appellant appeals.

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* Pursuant to New Jersey court rules, the Attorney General of the state intervened on appeal to defend the constitutionality of the statute.

The Questions Are Substantial.

This is an appeal under 28 U. S. C. § 1257(2) from a final judgment of the highest court of New Jersey where is drawn in question the validity of a New Jersey statute on the ground of its repugnance to the Commerce Clause (Article I, Section 8) of the United States Constitution, the decision below being in favor of its validity. The federal constitutional question was timely raised in the court of first instance, the Superior Court of New Jersey, which upheld the validity of the New Jersey statute as applied to appellant. This ruling was necessary to the decision, there being no independent state ground upon which the decision rested. The same constitutional question was raised on appeal to the New Jersey Supreme Court which ruled on it in the same manner, resting its decision on the opinion of the lower court.

It is beyond dispute that this Court's appellate jurisdiction is properly invoked under 28 U. S. C. § 1257(2), where, as here, the objection is that the state statute is unconstitutional as applied to the person challenging the statute.* *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Eureka Pipe Line Co.* v. *Hallanan*, 257 U. S. 265 (1921); *Fiske* v. *Kansas*, 274 U. S. 380 (1927); *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 (1940); *Standard Oil Co.* v. *Johnson*, 316 U. S. 481 (1942).

The constitutional question presented is a substantial one and is of major importance to every business corporation engaged in interstate commerce in the United States. The ruling of the New Jersey courts on this ques-

* Appellant does not question, of course, the constitutionality of the statute as applied to foreign corporations engaged in intrastate commerce in New Jersey.

tion was clearly erroneous, being in direct conflict with several long-standing decisions of this court holding that the Commerce Clause of the United States Constitution forbids the application of state qualification statutes to foreign corporations engaged in interstate commerce. *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 (1912); *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Furst* v. *Brewster*, 282 U. S. 493 (1931). The court below departed from this clear constitutional doctrine on the ground, demonstrably wrong, that the "trend and philosophy of the more recent cases" of this Court indicate that the doctrine is no longer valid (Opinion, Appendix C p. 34).

We are thus confronted with the unusual action of a state court presuming to disregard decisions of this Court which rest on a fundamental interpretation of the Commerce Clause. The principle is so clear that it has become a textbook rule. 23 AM. JUR. 248; 17 FLETCHER, CORPORATIONS 263, 504 (rev. vol. 1960). New Jersey, according to our research, stands alone in holding that this type of legislation can be applied to foreign corporations in interstate commerce. The constitutional doctrine established by this Court has been adhered to by every other state which has spoken on the subject either by statute* or

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* Alaska—Business Corporation Act §§ 99, 117
California—General Corporation Law § 6403
Delaware—Code, tit. 8, §§ 341, 343, 344 (1953)
Hawaii—Rev. Laws § 174-1 (1955)
Iowa—Law ch. 321 § 494 (1959)
Maine—Rev. Stat. ch. 53, § 127 (1954)
Maryland—Ann. Code art. 23, §§ 88, 90, 91 (1957)
North Carolina—Gen. Stat. § 55-131
North Dakota—Rev. Code Supp. § 10-2201 (1957)
Oregon—Rev. Stat. § 57.655 (1953)
Tennessee—Code Ann. §§ 48-901, 48-902 (1956)
Texas—Laws Ch. 64, art. 8.01 (1955)

by judicial decision.*

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* Alabama—*Hurst* v. *Fitz Water Wheel Co.*, 197 Ala. 10 72 So. 314 (1916)
Arizona—*Weber Showcase & Fixture Co.* v. *Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936)
Arkansas—*Sillin* v. *Hessig-Ellis Drug Co.*, 181 Ark. 386, 26 S. W. 2d 122 (1930)
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Illinois—*Lehigh Portland Cement Co.* v. *McLean*, 245 Ill. 326, 92 N. E. 248 (1910)
Indiana—*Vilter Mfg. Co.* v. *Evans*, 86 Ind. App. 144, 154 N. E. 677 (1927)
Kentucky—*Webb* v. *Knoxville Glass Co.*, 217 Ky. 225, 289 S. W. 260 (1926)
Louisiana—*Reynold Metals Co.* v. *T. L. James & Co.*, 69 So. 2d 630 (Ct. App. La. 1954)
Maine—*F. S. Royster Guano Co.* v. *Cole*, 115 Me. 387, 99 Atl. 33 (1916)
Massachusetts—*Remington Arms Co.* v. *Lechmere Tire & Sales Co.*, —— Mass. — —, 158 N. E. 2d 134 (1959)
Michigan—*Cleveland Cooperage Co.* v. *Detroit Milling Co.*, 235 Mich. 57, 209 N. W. 144 (1926)
Minnesota—*Weco Products Co.* v. *G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. of Minn. 1960)
Mississippi—*Smith* v. *J. P. Seeburg Corp.*, 192 Miss. 563, 6 So. 2d 591 (1942)
Missouri—*Superior Concrete Accessories, Inc.* v. *Kemper*, 284 S. W. 2d 482 (Sup. Ct. Mo. 1955)
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New Mexico—*Abner Mfg. Co.* v. *McLaughlin*, 41 N. M. 97, 64 P. 2d 387 (1937)
New York—*Brooks Transp. Co.* v. *Hillcrea Export & Import Co.*, 106 N. Y. S. 2d 868 (Sup. Ct. N. Y. 1951)
Ohio—*McClarran* v. *Longdin-Brugger Co.*, 24 Ohio App. 434, 157 N. E. 828 (1926)
Oklahoma—*Sooner Beverage Co.* v. *Heileman Brewing Co.*, 194 Okl. 252 150 P. 2d 72 (1944)
Rhode Island—*Johnson & Johnson* v. *Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958)

Indeed, eight recent cases arising under fair trade laws, and indistinguishable from the present case, have reached a result contrary to New Jersey.* Thus the New Jersey decision creates a conflict among state court decisions on parallel facts, which alone should impel this Court to exercise its appellate jurisdiction.

It is obvious that if the judgment below is allowed to stand, the effect will be to discredit a number of precedents of this Court and to place in confusion the constitutional status of state qualification statutes with respect to foreign corporations in interstate commerce. If, indeed, although appellant believes strongly to the contrary, there is ground for changing or modifying the doctrine of these cases, it seems inconceivable that the nature and extent of

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South Carolina—*State* v. *Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946)
South Dakota—*Wyman, Partridge Holding Co.* v. *Lowe*, 65 S. D. 139, 272 N. W. 181 (1937)
Utah—*Advance-Rumely Thresher Co.* v. *Stohl*, 75 Utah 124, 283 Pac. 731 (1929)
Washington—*Procter & Gamble Co.* v. *King County*, 9 Wash. 2d 655, 115 P. 2d 962 (1941)
West Virginia—*United Shoe Repairing Mach. Co.* v. *Carney*, 116 W. Va. 224, 179 S. E. 813 (1935)
Wisconsin—*Minneapolis Securities Corp.* v. *Silvera*, 254 Wis. 129, 35 N. W. 2d 322 (1948)
Wyoming—*Creamery Package Mfg. Co.* v. *Cheyenne Ice Cream Co.*, 55 Wyo. 277, 100 P. 2d 116 (1940)

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* *Remington Arms* v. *Lechmere Tire & Sales Co.*, —Mass.—, 158 N. E. 2d 134 (1959); *Weco Products Co.* v. *G. E. M., Inc.*, 1960 CCH Trade Cases, par. 69,639 (Dist. Ct. of Minn. 1960); *Seagram Distillers Co.* v. *Corenswet*, 198 Tenn. 644, 281 S. W. 2d 657 (1955); *Fromm & Sichel, Inc.* v. *Zimmerman*, 1956 CCH Trade Cases, par. 68,362 (D. Ill. 1956); *Ronson Corp* v. *Macher Jewelry & Watch Corp.*, 1955 CCH Trade Cases, par. 68,193 (N. Y. Sup. Ct. N. Y. Co. 1955); *Johnson & Johnson* v. *Narragansett Wiping Supply Co.*, 1958 CCH Trade Cases, par. 69,195 (R. I. Super. Ct. 1958); *Bulova Watch Co.* v. *Anderson*, 270 Wis. 21, 70 N. W. 2d, 243 (1955); *Sunbeam Corp.* v. *Grayson-Robinson Stores, Inc.*, 1953 CCH Trade Cases, par. 67,499 (Super. Ct. Cal. 1953).

such change should be allowed to be defined by a state court of first instance.

Consequently, whether or not the decision below should ultimately be upheld, the question here is substantial and merits review. Since that decision runs counter to a constitutional doctrine which has been accepted for many years and which should be reaffirmed, the necessity for noting jurisdiction here is even stronger. Indeed, if summary action is justified at all in this case, it would be on the side of a summary reversal on the basis of decisions of this Court which are squarely in point.

1. The constitutional rule applicable to this case is that a foreign corporation cannot be required to obtain authority from a state to transact interstate business in the state and cannot be barred from bringing suit in the state for failure to obtain such authority. This rule was established and reaffirmed in the following cases: *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 (1912); *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Furst* v. *Brewster*, 282 U. S. 493 (1931). In each of these cases this Court held that a foreign corporation which was not qualified under a state domestication statute, such as is involved in this case, could not be barred from suing in the courts of the state since its activities in the state were in interstate commerce.*

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* Although all these cases were cited by appellant in the court below, the only one even mentioned by the court was the *Pigg* case which it sought to distinguish on the basis of the particular Kansas qualification statute involved. The court's attempted distinction is not only far-fetched on its face but ignores the fact that cases subsequent to *Pigg*, dealing with a variety of statutes, have made it clear that the constitutional principle applies to any qualification statute regardless of its particular provisions.

The principle upon which these decisions were based had been established in *Crutcher* v. *Kentucky*, 141 U. S. 47, 57 (1891), where the Court said:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

Thus, in *Crutcher* this Court carved out an important exception to the earlier rule that a state could exclude a foreign corporation entirely from its limits or admit it only upon conditions. *Paul* v. *Virginia*, 8 Wall. 168 (U. S. 1868). The rule of the *Paul* case still applies to foreign corporations as regards intrastate commerce in which they engage within a state, even if such intrastate business is done by a corporation which is also engaged in interstate commerce. See, *e. g.*, *Railway Express Co.* v. *Virginia*, 282 U. S. 440 (1931); *General Ry. Signal Co.* v. *Virginia*, 246 U. S. 500 (1918). Such corporations are of course required to comply with state qualification statutes.*

The rule that the privilege of engaging in interstate commerce is not one conferred by the states is a bedrock

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* See *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944) where a qualification statute was upheld as applied to a foreign corporation doing a "localized" customs brokerage business. The corporation there was not itself involved in commerce across state lines, and the court distinguished *International Textbook Co.* v. *Pigg*, *supra*, and *Dahnke-Walker* v. *Bondurant*, *supra*, as involving foreign corporations which came into the state to "contribute to or to conclude a unitary interstate transaction." 322 U. S. at 211. So too the New Jersey activities of the appellant here merely contribute to its unitary interstate business.

constitutional doctrine of this Court. In the field of state taxation it underlies the rule that a state may not tax the privilege of engaging in interstate commerce. This rule was reaffirmed in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951) and in recent months was twice recognized as being "beyond dispute" in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959), and in *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 212 (1960).

It is therefore ironic, and illustrative of the error below, that *Portland Cement* was the only case cited by the trial court in support of its assertion that the "trend and philosophy of the more recent cases" justified its failure to follow the rule of the *Pigg* case.

The error of the New Jersey Court evidently stems from its failure to recognize the important distinction between state health, safety, or economic legislation incidentally affecting interstate commerce and legislation asserting state power over the federal privilege of engaging in interstate commerce. See *Sioux Remedy Co.* v. *Cope*, *supra* at 201; *Crutcher* v. *Kentucky*, *supra* at 60-61. The importance of this distinction was recently stressed by this Court in *Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U. S. 77 (1958). There this Court denied to the City of Chicago the power to license connecting motor vehicle service between railroad terminals, an integral part of interstate transportation authorized by federal legislation, while recognizing that the city could regulate the operation of the vehicles and subject them to traffic and safety laws. (See 357 U. S. at 88.) So too, appellant, of course, does not claim immunity from state police regulation, but merely asserts that its right to carry on interstate commerce in New Jersey is not subject to "leave from local authorities." (*Id.* at 87).

Unlike other Commerce Clause cases which have so often divided this Court in the past, *e. g., Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927) (Holmes, Brandeis & Stone, JJ., dissenting), the question involved in this case has not produced substantial disagreement or dissent in this Court. Four of the five principal cases relied on by appellant were unanimous decisions on the constitutional issue here involved, and the most recent one, *Furst* v. *Brewster, supra*, was not only unanimous but the opinion was written by Chief Justice Hughes and the Court included Justices Holmes, Brandeis, and Stone, none of whom could be thought insensitive to the valid claims of state legislation. Their adherence, with a unanimous Court, to the doctrine that a state may not trammel the federal privilege of engaging in interstate commerce demonstrates the soundness of the doctrine and the need for recognizing its continued vitality.

2. The most objectionable feature of the New Jersey statute, and the one directly in issue here, is the sanction imposed for failure to obtain a certificate of authority —denial of access to the courts of the state. Any deprivation of access to the courts is always to be severely scrutinized, since, as this Court stated in *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, 148 (1907):

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

Such a sanction, applied to foreign corporations engaged in interstate commerce, obviously interferes with that commerce since it prevents enforcement of obligations arising from interstate commerce. *Sioux Remedy Co.* v.

Cope, 235 U. S. 197 (1914); *Furst* v. *Brewster*, 282 U. S. 493 (1931).

In both these cases, the Court stated the governing principle in categorical terms: A corporation has a constitutional right to come into a state for "all the legitimate purposes" of interstate commerce, including "all the component parts of commercial intercourse between different States," and access to the courts in furtherance of that commerce cannot be denied. 235 U. S. at 203-204; 282 U. S. at 498. That principle clearly applies here; appellant's protection of its trademarks and brand name through fair trade pricing, and court enforcement thereof, is an integral part of its interstate operation. *Remington Arms* v. *Lechmere Tire & Sales Co.*, —— Mass. ——, 158 N. E. 2d 134 (1959); *Bulova Watch Co.* v. *Anderson*, 270 Wis. 21, 70 N. W. 2d 243 (1955).

That the cause of action sued on here was created by the state is without significance. The suits in *Sioux* and *Furst* were also based on state-created causes of action—to enforce contracts made within the state—yet in both cases the Court held that the state could not constitutionally make qualification a condition of suit. Nor can the provisions of the qualification statute be defended as a regulation of court procedure since, as this Court stated in *Sioux* (235 U. S. at 205) they "have no natural or reasonable relation to the right to sue which they are intended to restrict."

As has been shown, the basic power to require qualification under the New Jersey statute is constitutionally lacking in this case, but even were it otherwise, the no-suit sanction would contravene the Commerce Clause. This Court more than once has held that, regardless of the validity or invalidity of the underlying regulation, enforcement by any sanction interfering with interstate commerce is forbidden. *Western Union Tel. Co.* v. *Massachusetts*,

125 U. S. 530 (1888); *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954); see also *Hill* v. *Florida*, 325 U. S. 538, 543 (1945).

3. No legitimate state interest calls for overruling at this time the line of authority ranging from the *Pigg* case to *Furst* v. *Brewster*. The New Jersey qualification statute, like those involved in the cited cases, was designed to assure that foreign corporations would be subject to suit in the state. When the New Jersey statute was enacted in 1896 it was thought that the theory that a corporation exists only in the state of incorporation might render a foreign corporation immune from suit without its consent. See *Groel* v. *United Electric Co.*, 69 N. J. Eq. 397, 60 Atl. 822 (Ch. 1905).

But this rationale of the statute has long been obsolete. In 1914 this Court held that a corporation engaged solely in interstate commerce within a state was sufficiently "present" there to be amenable to suit without its consent, express or implied. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579 (1914). And more recent decisions, discarding the "presence" test, make clear that foreign corporations are subject to suit on the basis of minimum contacts within the state. *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

As a result of this development, the qualification statute is no longer necessary to carry out the purpose for which it was enacted, since the state can assert jurisdiction without exacting consent. See Note, 33 Ind. L. J., 358, 376 (1958). It would therefore be ironic for this Court to permit the application of qualification statutes to corporations in interstate commerce now, when they are no longer

needed by the states to protect their citizens, after having consistently invalidated such statutes in the past.

In large part the error of the trial court is due to its failure to distinguish cases dealing with amenability to suit, such as *International Shoe* and *McGee*, from cases dealing with access to courts, such as *Pigg* and *Sioux*. In the former the constitutional question arises under the Due Process Clause of the Fourteenth Amendment and concerns the jurisdiction of state courts over foreign corporations; in the latter it arises under the Commerce Clause and relates to whether the right to engage in interstate commerce can be subjected to conditions by the states. This distinction has always led to different results on similar facts in the two types of cases. That this is no recent development can be seen by comparing the *Pigg* decision of 1910 with the *International Harvester* decision of 1914.

As pointed out earlier, New Jersey stands alone in failing to recognize the distinction between these two types of cases. For example, in *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917), the New York Court of Appeals held that a corporation doing interstate business in New York was subject to suit in New York courts although not required to qualify to do business as a foreign corporation under New York's General Corporation Law. As Judge (later Mr. Justice) Cardozo put it:

> "In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here (*International Text Book Co.* v. *Pigg*, 217 U. S. 91)." 220 N. Y. at 267.

The highest court of South Carolina likewise held that a foreign corporation doing interstate business in South Carolina could not be subjected to a penalty for failure to qualify as a foreign corporation although the court held in the same case that the corporation was subject to the process of the state court in the state's suit to collect the penalty. *State* v. *Ford Motor Co.*, 208 S. C. 379, 38 S. E. 2d 242 (1946).

By failing to recognize this important distinction, the court below reached the anomalous conclusion, which it strangely considered "fair," that appellant should be barred from suing appellee even though appellant unquestionably could have been sued by appellee in the courts of New Jersey.* It is difficult to believe that the court below seriously meant to imply that the "minimum contacts" which satisfy due process also enable a state to impose conditions upon the right to engage in interstate commerce. Such a rule would do no less than transfer from Congress to state legislatures the essential power over interstate commerce.

Significantly the Attorney General of New Jersey, in intervening below, did not try to justify the statute on the ground for which it was enacted—amenability to suit—but rather defended it as allegedly providing information to help the taxing authorities of New Jersey to determine what foreign corporations are engaged in activities that may be subject to taxation by the state. This pretext is indeed flimsy. Aside from the fact that this was not the purpose of the statute, but rather at best a newly-discovered

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* This unjust result has been described by one law review writer in the following terms:

"You can't sue me since you didn't qualify so as to insure that I could sue you; but even though you didn't qualify I can sue you." See Note, 33 IND. L. J., 358, 370 (1958).

side effect, it suffices to point out that if the state cannot tax the privilege of engaging in interstate commerce, *Spector Motor Service* v. *O'Connor, supra,* it cannot condition that privilege on giving information for tax purposes.

Further, the sanction barring access to the Courts of the state, has no rational connection with the taxing power. Cf. *Furst* v. *Brewster, supra* at 498; *Sioux Remedy Co.* v. *Cope, supra* at 205. Certainly denial or restriction of the right to engage in interstate commerce has never been held a proper method of enforcing tax laws. On the contrary this Court has specifically held that for such purposes a state is restricted to the ordinary means of collection and enforcement and cannot resort to sanctions interfering with interstate commerce. *Western Union Tel. Co.* v. *Massachusetts,* 125 U. S. 530 (1888); and see *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 462 (1959).*

In sum, the decisions of this Court from *Pigg* to *Furst* are not only controlling here but are as soundly based today as when they were decided.

---

* Actually, qualification under the New Jersey Corporation Statute carries with it burdens going even beyond those apparent on the face of that statute. For example, New Jersey's Corporation Business Tax Act imposes upon a qualifying corporation a tax expressly designated as a tax "for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business * * * in this State." N. J. Rev. Stat. 54:10A-2. Regulation 16:10-1.130 of the New Jersey Corporation Tax Bureau, implementing this tax statute, provides that any foreign corporation "holding a general Certificate of Authority to do business in this state issued by the Secretary of State" automatically acquires taxable status and is required to file a return and pay a tax.

Conclusion.

For fifty years the principle of the *Pigg* case has been relied upon by corporations all over the country in formulating their business policies and methods. That principle has been accepted by every state in the Union except New Jersey, and indeed by New Jersey itself until this case. *Federal Schools, Inc.* v. *Sidden*, 14 N. J. Misc. 892, 188 Atl. 446 (Sup. Ct. 1936). If American business were now told that the rule on which it has so long relied is being changed, and that interstate corporations large and small can now be required to comply with fifty different sets of state corporation laws, with their varying requirements as to filing of reports, payment of fees and taxes and subjection to jurisdiction, the result would be an intolerable burden on the free flow of interstate commerce.

The judgment below being clearly erroneous, and the constitutional issue substantial, probable jurisdiction should be noted and the judgment below reversed.

Respectfully submitted,

JOSEPH H. STAMLER,
MELVIN P. ANTELL,
11 Commerce Street,
Newark 2, New Jersey,

LORENTZ & STAMLER,
Of Counsel.

EVERETT I. WILLIS,
40 Wall Street,
New York 5, New York,
Attorneys for Eli Lilly and Company, Appellant.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD,
Of Counsel.

June 1960.

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APPENDIX A.

Opinion of Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY
No. A-85. SEPTEMBER TERM 1959.

ELI LILLY AND COMPANY, a corporation of the State of Indiana,
Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of New Jersey,
Defendant-Respondent.

Argued February 22, 1960. Decided March 7, 1960.

On appeal from a judgment of the Superior Court, Chancery Division, whose opinion is reported at 57 N. J. Super. 291.

MR. MELVIN P. ANTELL argued the cause for the appellant (MESSRS. LORENTZ & STAMLER, attorneys).

MR. WARREN E. DUNN argued the cause for the defendant-respondent (MESSRS. LUM, FAIRLIE & FOSTER, attorneys); MR. CLAUS MOTULSKY, of the New York bar, on the brief.

MR. MURRY BROCHIN argued the cause for the State of New Jersey, intervenor (MR. DAVID D. FURMAN, attorney).

PER CURIAM

The judgment is affirmed for the reasons expressed in the opinion of Judge Scherer in the Court below.

A true copy,

JOHN H. GILDEA,
Clerk.

APPENDIX B.

Judgment of Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY
Appeal Docket No. 3139.

ELI LILLY AND COMPANY, a corporation of the State of Indiana,
Plaintiff-Appellant,

vs.

SAV-ON-DRUGS, INC., a corporation of the State of New Jersey,
Defendant-Respondent.

Civil Action.
On Appeal.
Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Melvin P. Antell, counsel for the appellant and Mr. Warren M. Dunn, counsel for the respondent, and Mr. Murry Brochin, counsel for the State of New Jersey, intervenor, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearings shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the seventh day of March, 1960.

FILED
Mar 7 1960
John H. Gildea
Clerk

JOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy,

JOHN H. GILDEA,
Clerk.

APPENDIX C.

Opinion of Superior Court of New Jersey, Chancery Division.

(Filed September 29, 1959.)

Decided September 29, 1959.

MESSRS. LORENTZ AND STAMLER (MESSRS. JOSEPH H. STAMLER AND MELVIN P. ANTELL appearing), Attorneys for Plaintiff.

MESSRS. LUM, FAIRLIE & FOSTER (MESSRS. WILLIAM F. TOMPKINS AND WARREN E. DUNN appearing), Attorneys for Defendant.

SCHERER, *J. S. C.*

Plaintiff is a corporation of the State of Indiana not authorized to transact business in the State of New Jersey. It does not have a certificate from the Secretary of State as required by N. J. S. 14:15-4. It filed the present suit to compel the defendant to comply with minimum prices fixed for the resale of plaintiff's products, in accordance with N. J. S. 56:4-3 et seq., generally known as the Fair Trade Act. The facts are substantially undisputed and appear in the affidavits filed by both parties.

Plaintiff is one of the largest dealers of pharmaceutical products in this country, if not in the world, and its products are distributed throughout the United States and in foreign countries. Its office and principal place of business is in Indianapolis, Indiana. Plaintiff's products within the United States are sold to selected wholesale distributors and in interstate commerce. It is said that the business done in New Jersey represents 2.7% of its domestic sales. Plaintiff does not sell directly to the retail trade, but its products reach the retail trade through wholesale distributors. Plain-

tiff says that it leases no sales office, owns no real estate, and maintains no warehouse or other place of business in this state. Its products are "fair traded" in New Jersey under the above cited statute and it claims to have approximately 1500 contracts in effect in this state signed by retailers of its products, under which these retailers agree to maintain the minimum price structure fixed by plaintiff.

Defendant is a retail drug company with stores in Plainfield and Carteret. Defendant did not sign any contract, but it admits having notice of the fact that plaintiff has fair trade contracts in force and that it is, therefore, bound by the provisions of the Fair Trade Act, unless its other defenses are sustained. Even though a non-signer, defendant must maintain plaintiff's minimum price structure. N. J. S. 56:4-6; *Lionel Corp.* v. *Grayson-Robin Stores*, 15 N. J. 191 (1954), appeal denied 99 L. ed. 677, 348 U. S. 859 (1954).

The complaint charges that defendant sold plaintiff's products below the minimum prices fixed by it, in that in some instances, while selling at the minimum prices, it gave to its customers "S. & H. Green Cooperative Cash Discount Stamps," which are redeemable for merchandise, thus in effect lowering the prices of plaintiff's products below the minimum by the amount of the discount represented by the stamps. Whether this constitutes willfully and knowingly advertising or selling plaintiff's products at less than the prices stipulated by it—which defendant denies—need not be now decided. See *E. R. Squibb & Sons and Eli Lilly & Company* v. *Charline's Cut Rate, Inc.*, 9 N. J. Super. 328 (Ch. Div. 1950); *Bristol-Myers Co.* v. *Picker*, 96 N. E. 2d 177 (Ct. App., N. Y. 1950); *Bristol-Myers Co.* v. *Lit Brothers, Inc.*, 6 A. 2d 843 (Sup. Ct., Pa. 1939); *Weco Products Co.* v. *Mid-City Cut Rate Drug Stores*, 131 P. 2d 856 (Dist. Ct. App., Cal. 1942); *Sperry and Hutchinson Co.* v. *Margetts*, 15 N. J. 203 (1954). Defendant is

charged also with violating the minimum price structure by selling other products of the plaintiff below the minimum prices in cases where no stamps were given. Plaintiff originally applied for an interlocutory injunction (R. R. 4:67) to enjoin all sales by defendant below minimum prices until final hearing.

Defendant admitted the sales but denied that in any instance the sales were below minimum prices or that there were any willful and knowing sales below such prices, in violation of N. J. S. 56:4-6. With respect to the sales made of products other than those with which stamps were given, defendant states that it made up packages from bulk shipments and that the products of plaintiff were packaged under defendant's name and, therefore, they were exempt under the provisions of N. J. S. 56:4-5(1). It is doubtful that this constitutes a good defense because the bottle which was marked in evidence clearly disclosed that the plaintiff's name and trademark appeared on the label, and defendant was obviously seeking to gain the benefit of plaintiff's good will. This may not be done. *Johnson & Johnson* v. *Weissbard*, 121 N. J. Eq. 585, 586 (E. & A. 1937).

The substantial defense interposed is that plaintiff, being a foreign corporation, was required as a condition precedent to transacting business in this state to file with the Secretary of State, under N. J. S. 14:15-3, a copy of its certificate of incorporation and a statement providing information required by that section, and, as a preliminary to instituting suit in this state "upon any contract made by it in this state," was required to obtain a certificate from the Secretary of State under N. J. S. 14:15-4. It is conceded that neither of the last cited sections has been complied with by the plaintiff.

Plaintiff's application for an interlocutory injunction was denied on the ground that its right to relief was not

clear as a matter of law, in view of the above mentioned legal defenses. *General Electric Co.* v. *Gem Vacuum Stores*, 36 N. J. Super. 234 (App. Div. 1955); *Wilentz* v. *Crown Laundry Service, Inc.*, 116 N. J. Eq. 40 (Ch. 1934); *Allman* v. *United Brotherhood of Carpenters, &c.*, 79 N. J. Eq. 150, 155 (Ch. 1911).

The matter is now before the Court on defendant's motion to strike the complaint and for summary judgment on the ground that the plaintiff is transacting business in this state contrary to N. J. S. 14:15-3 and, being a foreign corporation, is precluded from bringing this action under N. J. S. 14:15-4. As an integral part of these defenses, the defendant urges the provisions of N. J. S. 14:15-5, where it is provided as follows:

> "14:15-5. Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations
>
> When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

The State of Indiana has a similar statute, and the requirements of that state upon foreign corporations are much more onerous than those imposed by our statute. The Indiana statute (Burns' Annotated Statutes of Indiana) provides:

> "25-314: Penalties. No foreign corporation transacting business in this state without procuring a certificate of admission or, if such a certificate has been procured, after its certificate of admission has been withdrawn or revoked, *shall maintain any suit or proceeding in any of the courts of this state upon any demand, whether arising out of contract or tort;* and every such corporation so transacting business shall be liable by reason thereof to a penalty of not exceeding ten thousand dollars ($10,000), to be recovered in any court of competent jurisdiction in an action to be begun and prosecuted by the attorney general in any county in which such business was transacted.
>
> "If any foreign corporation shall transact business in this state without procuring a certificate of admission, or, if a certificate has been withdrawn or revoked, or shall transact any business not authorized by such certificate, such corporation *shall not be entitled to maintain any suit or action at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort, in any court in this state;* and it shall be the duty of the attorney general, upon being advised that any foreign corporation is so transacting business in this state, to bring action in the circuit or superior court of Marion County for an injunction to restrain it from transacting such unauthorized business and for the annulment of its certificate of admission, if one has been procured. • • •." (Emphasis supplied.)

Plaintiff argues that it is not doing business in this state and that, even if it be held that it is, the above cited provisions of our Corporation Act do not apply to it because its goods are distributed solely in interstate commerce, thus exempting it from the provisions of any regulatory state statute of the kind above quoted, and that to apply to it the provisions of N. J. S. 14:15-3, 4 and 5 is to impose a burden upon interstate commerce which is forbidden by the commerce clause of the Federal Constitution (*United States Constitution*, Article I, Sec. 8, Clause 3).

Plaintiff countered the motion to dismiss with a renewal of its motion for interlocutory injunction on the ground that, if the defendant's motion should be denied, then plaintiff's motion should be granted because then its right to relief as a matter of law would be clear, thus eliminating the reason for the original denial of its motion.

I.

Is the plaintiff doing business in New Jersey? The facts in the affidavits filed in support of the respective motions differ in only one material respect. Defendant says that plaintiff's salesmen, or "detailmen" as plaintiff calls them, in New Jersey accept orders for the purchase of plaintiff's products, while plaintiff denies this to be true and says that, even though on occasions its representatives may receive an order for plaintiff's products, they do so only for the purpose of transmitting the same to the wholesaler and that such orders are subject to acceptance or rejection by such wholesaler. In view of the result reached, this fact is immaterial, but it will be assumed that the plaintiff's statement is correct.

The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building.

Appendix C—Opinion of Superior Court of New Jersey, Chancery Division.

(The September 1959 issue of the Newark Telephone Directory lists the plaintiff both in the regular section and in the classified section under "Pharmaceutical Products" as having an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino "for all expenses incidental to the maintenance and operation of said office." There is a secretary in the office, who is paid directly by the plaintiff on a salary basis. There are eighteen "detailmen" under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commission. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment, or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is "promotional and informational only." On an occasion, these detailmen, "as a service to the retailer," may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield stores. Plaintiff says that all of its fair trade contracts and orders for its products are subject to acceptance in Indiana, and therefore none of

them constitutes a contract made, or order taken, in this state.

Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey. It concedes that, perhaps for the purpose of having service of process made upon it in a suit in which it is a defendant, it might conceivably be properly served within this state. But, it says that, although it may be subject to the jurisdiction of the state courts and amenable to service of process therein when it is sued, it is not subject to the statute regulating foreign corporations or prescribing the conditions of their doing business in that state. 146 A. L. R. 942. The difference, it is claimed, is ascribable to the fact that the power of a state to subject a foreign corporation engaged in interstate commerce to local regulations is limited and restricted by the commerce clause of the Federal Constitution. On this subject, more hereafter.

The New Jersey Corporation Act does not define "transacting any business" in this state. Our Supreme Court, in *A & M Trading Corp.* v. *Pennsylvania R. Co.*, 13 N. J. 516 (1953), quoting with approval from *Yedwab* v. *M. A. Richards Corp.*, 137 N. J. L. 448 (Sup. Ct. 1948), observed that doing business is a term that is not susceptible of precise definition automatically resolving every case, and that each case turns upon its own circumstances.

To hold under the facts above recited that plaintiff is not doing business in New Jersey is to completely ignore reality. A corporation thus acting within this state should not be permitted to take advantage of the laws of this state which promote its business, such as the Fair Trade Act (which is the sole basis for this suit), and yet not comply with reasonable regulatory provisions of our Corporation Act. As is noted in 146 A. L. R. 957, where this subject is discussed in detail, many corporations selling products in the several states act, with a studied purpose, to avoid

the necessity of conforming to state laws or becoming subject to service of process. *Thew Shovel Co.* v. *Superior Ct.*, 95 P. 2d 149 (App. Ct., Cal. 1939).

Most of the cases in which the question of whether a corporation is or is not doing business in a particular state has arisen are those in which service of process was attempted to be made upon a foreign corporation or a tax was sought to be assessed. See *Miklos* v. *Liberty Coach Co.*, 48 N. J. Super. 591 (App. Div. 1958); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. ed. 95 (1945); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 2 L. ed. 2d 223 (1957); *A & M Trading Corp.* v. *Pennsylvania R. Co., supra; Westerdale* v. *Kaiser-Frazer Corp.*, 6 N. J. 571 (1951). The present case is the converse of those cited. Here, the plaintiff seeks not to avoid service, but to be permitted to sue.

If, as stated in the *Miklos* case (quoting from the *International Shoe Co.* case), at p. 598, "that in order to subject a foreign corporation to a judgment *in personam*, if it be not present within the territory of the forum, it have 'certain minimum contacts with (the forum) such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice," ' " so the plaintiff here, in the interest of fair play and substantial justice, should not object to complying with the requirements of the Corporation Act and securing a certificate to do business here, thus enabling it to maintain its suit. This, however, the plaintiff refuses to do. It has been held that such a certificate is secured timely if taken out pending an action. *Lehigh, &c., Co.* v. *Atlantic S. & R. Works*, 92 N. J. Eq. 131, 148 (Ch. 1920). It has been stated that the effect of the *International Shoe Co.* case was to establish a rule that, where a foreign corporation is present within the state, the court looks not only to the regularity, continuity and extent of the corporate activity within the state, but also

to whether the cause of action asserted resulted from the corporate activity within the state and the convenience to the parties. *Fletcher, Corporations*, Sec. 8713.1, pp. 419-420.

Plaintiff cites *Remington Arms Co.* v. *Lechmere Tire & Sales Co.*, 158 N. E. 2d 134 (Sup. Jud. Ct., Mass. 1959), as an example of a case where a foreign corporation, under facts quite similar to those here, was held not to be doing business in Massachusetts and was not required to secure a certificate to do business as a condition precedent to securing relief under the local Fair Trade Act. The suit was started under the Massachusetts Fair Trade Act, and the defenses here interposed were there set up, but overruled.. Plaintiff was granted an injunction. The Massachusetts court held that Remington was not doing business within that state and had a right to use the facilities of the Massachusetts courts. Significantly, however, the court said, at p. 138, that its findings were based upon earlier decisions and that it had not been asked to reconsider those in the light of subsequent United States Supreme Court decisions broadening the scope of local regulations dealing with foreign corporations. It would appear, therefore, that, if this precise point had been argued, the result might have been different.

Applying the tests set forth in the cited authorities to the undisputed evidence disclosed by the affidavits, the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act.

II.

Plaintiff contends that it is excepted from any requirement to comply with foreign corporation provisions of our Corporation Act because it is engaged entirely in interstate

commerce, and that it is unlawful for any state to impose such regulations upon interstate commerce as will constitute a burden thereon.

Not all state regulations affecting foreign corporations constitute a burden upon interstate commerce, thereby rendering them unconstitutional. *General Electric Co.* v. *Packard Bamberger & Co.*, 14 N. J. 209, 221 (1953). The regulation is only unlawful if it materially restricts the free flow of commerce across state lines. In *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 89 L. ed. 1915, 1925 (1945), the court said:

> "* * * There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern."

Plaintiff relies heavily for support of its argument on *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 54 L. ed. 678 (1910). There, the court struck down a Kansas statute requiring a foreign corporation to secure a certificate to do business as a condition precedent to instituting suit. A comparison of the Kansas statute with ours will show that the requirements of that statute were much more onerous than those in our statute. It is interesting to note, also, that the court did not specifically pass upon the requirement that the corporation have a certificate before instituting suit, but held that, since this section of the statute was so connected with the other sections held unconstitutional as to be inseparable, it too, had to fall. The court went on to say, at page 687:

> "• • • How far a corporation of one state is entitled to claim in another state, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts, is a question which the exigencies of this case do not require to be definitely decided. • • •."

This case was followed by our former Supreme Court in *Federal Schools, Inc.* v. *Sidden*, 14 N. J. Misc. 892 (1936), but the decision in that case rested not upon any alleged illegal interference with interstate commerce, but upon the fact that the contract sued upon, being one made outside of New Jersey, was not interdicted by the provisions of then Section 98 of the Corporation Act (now N. J. S. 14:15-4).

The trend and philosophy of the more recent cases has been in favor of upholding, rather than striking down, reasonable state regulations of foreign corporations. This is illustrated by the very recent case of *Portland Cement Co.* v. *Minnesota*, 3 L. ed. 2d 421, 79 S. Ct. (1959), in upholding a state income tax imposed upon a foreign corporation. In sustaining the right of a state to exact an income tax from a foreign corporation upon that portion of its profits derived from activities within the state, the court said, at page 429:

> "• • • While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. • • •."

As early as 1908 the Supreme Court, in *Galveston, H. & S. A. R. Co.* v. *Texas*, 52 L. ed. 1031, 210 U. S. 217 (1908), said:

> "It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. * * * "

If the levying of an income tax on the business of a foreign corporation which is generated within a state is not a burden upon interstate commerce, how can it be said that a simple regulatory statute, such as the cited sections of our Corporation Act, can impose a burden upon interstate commerce?

It must also be borne in mind that the cause of action here sued upon arises only because of the provisions of our Fair Trade Act. Such contract as the plaintiff relies upon would be illegal except for the provisions of that statute. *General Electric Co.* v. *Packard Bamberger & Co., supra.* Can it be said that there is anything unfair about requiring a foreign corporation, which seeks to take advantage of a cause of action given it by one of our laws, to comply with the provisions of the other as a condition to taking advantage of the other statute? To pose the question is to suggest the answer.

In the *General Electric Co.* case, the court said that, although the power of Congress over interstate commerce may be exclusive as to a direct statutory regulation of interstate commerce as such, the states are authorized under pertinent decisions of the United States Supreme Court (citing cases) to enact regulations which affect all business done in the state, if such regulations are reasonable and not

burdensome to interstate commerce. The simple requirements of our Corporation Act are reasonable and cannot be called burdensome. To hold that these regulations constitute such a burden upon interstate commerce as to exempt the plaintiff from the provisions thereof is to indulge in an unwarranted legalism.

The cases of *Seagram Distillers Company* v. *Corenswet*, 281 S. W. 2d 657 (Sup. Ct., Tenn. 1955); *State* v. *Ford Motor Co.*, 38 S. E. 2d 242 (Sup. Ct., S. C. 1946); *Bulova Watch Co.* v. *Anderson*, 70 N. W. 2d 243 (Sup. Ct., Wis. 1955), cited by plaintiff in support of its position, have been examined, and the holdings there do not require any change in the result here reached.

III.

Finally, it is argued that the provisions of N. J. S. 14:15-4 do not apply because that section precludes the maintaining of an action in this state only "upon any contract made by it (the foreign corporation) in this state." Admittedly, the 1500 contracts made by plaintiff with its retailers are Indiana contracts, since they were subject to acceptance there, and it is said that the orders received for plaintiff's products are likewise subject to acceptance in Indiana.

That this statute is ordinarily limited to contracts made in this state has been held in several cases. *Federal Schools, Inc.* v. *Sidden, supra* (and the numerous cases therein cited); *Protective Finance Corp.* v. *Glass*, 100 N. J. L. 85 (Sup. Ct. 1924); *Lehigh, &c., Co.* v. *Atlantic S. & R. Works, supra*. None of these cases was a suit upon a cause of action arising only out of one of our statutes. Also, this argument does not take into consideration the provisions of N. J. S. 14:15-5 (sometimes referred to as a "mutual spite" or "retaliatory" statute). Most states, including, as above noted, Indiana, have such statutes.

The Indiana statute bars suits arising out of contract, as well as tort, whether such actions are at law or in equity. Plaintiff argues that its action is one in tort and therefore not precluded by the Corporation Act. It would seem, however, that the action is one on contract because, while the defendant is a non-signer of a fair trade contract, it is liable under the statute since other persons have signed such contracts. Non-signers have been held to be bound to the same degree as signers. See *Old Dearborn D. Co.* v. *Seagram-Distil. Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936); *Lionel Corp.* v. *Grayson-Robinson Stores, supra.*

Quaere: Under these circumstances, is not the relationship of the plaintiff and defendant one of a contract made in the State of New Jersey, created by the Fair Trade Act as a result of the signing of other contracts by persons in New Jersey?

N. J. S. 14:15-5 was discussed in *Ex-Cell-o Corp.* v. *Farmers Coop. Dairies Ass'n*, 28 N. J. Super. 159 (App. Div. 1953), but its provisions were not applied because the defense was first raised on appeal, and not below. That opinion indicates—without stating reasons—that this may be a disfavored defense. But, when timely raised, as here, it should not be so considered. No valid reason is given by plaintiff why the provisions of the statute should not be applied, except the argument concerning interstate commerce heretofore disposed of. In *Babe Kaufman Music Corp.* v. *Mandia*, 127 N. J. Eq. 480 (Ch. 1940), this defense was interposed and the court, after reviewing the retaliatory provisions of the New York Corporation Law—the plaintiff being a corporation of New York—refused to enforce the contract.

While it is clear that the provisions of N. J. S. 14:15-4 apply, and that the relationship between plaintiff and defendant is based upon a contract made in this state by vir-

tue of the Fair Trade Act, it is also clear that the provisions of N. J. S. 14:15-5 are applicable and, based upon the retaliatory provisions of the Indiana statute, the plaintiff's suit is barred. The plaintiff's application for an interlocutory injunction, therefore, is denied.

Since the affidavits disclose palpably that there is no genuine issue as to any material fact, the defendant is entitled to a summary judgment dismissing the complaint, with costs. R. R. 4:58-3; *Frank Rizzo, Inc.* v. *Alatsas*, 27 N. J. 400, 405 (1958).

A judgment may be presented in accordance with these conclusions.

APPENDIX D.

Final Judgment of Superior Court, Chancery Division.

(Filed October 1, 1959 at 1:55 p. m.)

This matter having been opened to the Court on Friday, August 21, 1959 by Lum, Fairlie & Foster, Attorneys for Defendant (William F. Tompkins and Warren E. Dunn appearing) in the presence of Lorentz & Stamler, Attorneys for Plaintiff (Melvin P. Antell appearing) and in the presence of Casey, Lane & Mittendorf of the New York Bar, of Counsel to the Defendant (Roger Lloyd and Klaus Motulsky appearing), upon Defendant's motion to dismiss the complaint, and the Court having considered all of the pleadings, affidavits, exhibits and proofs, and the Court having further considered the argument of counsel thereon, and the Court having rendered a written opinion on September 29th, 1959, for the reasons therein stated,

It is on this 1st day of October, 1959;

ORDERED and ADJUDGED that the Complaint be and the same hereby is dismissed, with costs to the defendant.

EVERETT M. SCHERER,
J. S. C.

We hereby consent to the form of the foregoing order.

LORENTZ & STAMLER,
Attorneys for Plaintiff,

By MELVIN P. ANTELL,
A Partner.

APPENDIX E.

Sections of New Jersey Revised Statutes Involved.

14:15-3.

"Copy of charter and statement to be filed; certificate of authority to do business. Every foreign corporation, except banking, insurance, ferry and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation, attested by its president and secretary, under its corporate seal, and a statement attested in like manner setting forth:

"a. The amount of its authorized capital stock and the amount actually issued;

"b. The character of the business which it is to transact in this state; and

"c. The principal office of the corporation in this state and the name and place of abode of an agent upon whom process against such corporation may be served, which agent shall be a domestic corporation or a natural person of full age actually resident in this state, and the agency shall continue until the substitution, by writing, of another agent.

"Thereupon the secretary of state shall issue to the corporation a certificate that it is authorized to transact business in this state, and that the business is such as may be lawfully transacted by corporations of this state, and he shall keep a record of all such certificates issued."

14:15-4.

"Certificate of authority to do business prerequisite to suits on contracts. Until such corporation so transacting business in this state shall have

obtained such certificate of the secretary of state, it shall not maintain any action in this state upon any contract made by it in this state."

14:15-5.

"*Obligations imposed on domestic corporations doing business in foreign states imposed on foreign corporations.* When, by the laws of any other state or nation, any other or greater taxes, fines, penalties, licenses, fees or other obligations or requirements are imposed upon corporations of this state, doing business in such other state or nation, or upon their agents therein, than the laws of this state impose upon their corporations or agents doing business in this state, so long as such laws continue in force in such foreign state or nation, the same taxes, fines, penalties, licenses, fees, obligations and requirements of whatever kind shall be imposed upon all corporations of such other state or nation doing business within this state and upon their agents here, but nothing herein shall be held to repeal any duty, condition or requirement now imposed by law upon such corporations of other states or nations transacting business in this state."

14:15-6.

"*Penalty for failure to obtain certificate of authority to do business.* Every foreign corporation transacting any business, directly or indirectly, in this state, without having first obtained authority therefor, as provided in section 14:15-3 of this title, shall for each offense forfeit to the State the sum of two hundred dollars, to be recovered with costs in an action prosecuted by the attorney general in the name of the state."